

Personal Services Contracts and the A-76 Process

1. The Office of Management and Budget (OMB) Circular No. A-76, dated 4 August 1983, established Federal policy regarding the performance of commercial activities. The Circular provides that the Federal Government is to rely on commercially available sources to provide commercial products and services if it is determined, after a cost comparison of the cost of contracting and the cost of in-house performance, that the product or service can be procured more economically from a commercial source.
2. FAR 37.104(b), however, prohibits Government agencies from awarding personal services contracts unless specifically authorized by statute to do so such as contracts for architect-engineer services authorized by 40 U.S.C. 541-544.
3. The question that arises is whether the policy set forth in OMB Circular A-76 is consistent with the prohibition against contracts for personal services at FAR 37.104(b).
4. OMB Circular No. A-76 addresses the prohibition against contracting for personal services at paragraph 7(c)(5), where it states that the Circular and Circular No. A-76 Revised Supplemental Handbook (RSH) do not:

Authorize contracts, which establish an employer-employee relationship between the Government and contractor employees. An employer-employee relationship involves close, continual supervision of individual contractor employees by Government employees, as distinguished from general oversight of contractor operations. However, limited and necessary interaction between Government employees and contractor employees, particularly during the transition period of conversion to contract, does not establish an employer-employee relationship.

5. Department of the Army Pamphlet 5-20 (DA Pam), dated 31 July 1998, specifically excludes contracts for personal services from inclusion in an A-76 study. At paragraph 6-9, DA Pam 5-20 states that:

In reviewing the PWS you forward with the purchase request, the DOC [Directorate of Contracting or Director of Contracting] will determine if it contains any personal services. Personal service contracts are strictly prohibited unless specifically authorized by law. A personal services contract, by its expressed terms or how it is administered makes contractor personnel appear to be government employees. This happens when it appears that contractor personnel

are subject to relatively close and continuous government supervision. Your DOC representative will advise you to either omit those PWS tasks identified as personal services, or rewrite the task descriptions to omit any personal service-type references.

6. The A-76 process cannot, therefore, be used as a vehicle to circumvent the prohibition against awarding contracts for personal services. The next question is what is the basis for the DOC to determine whether or not a PWS for an A-76 study includes requirements for personal services.

7. The guidance set forth in OMB Circular No. A-76 and the DA Pam is consistent with the definition of personal and nonpersonal services set forth at FAR 37.101- Definitions. A personal services contract is defined at FAR 37.101 as “a contract that, by its express terms or as administered, makes the contractor personnel appear, in effect, Government employees (see 37.104).” This definition of a personal services contract is also similar to that set forth in Army Regulation (AR) 5-20, Commercial Activities Program, dated 1 October 1997, which defines a personal services contract as one which “by its expressed terms or how it’s administered, makes contractor personnel appear to be government employees. This happens when it appears that contractor personnel are subject to relatively close and continuous government supervision.”

8. A nonpersonal services contract is defined at FAR 37.101 as “a contract under which the personnel rendering the services are not subject, either by the contract’s terms or by the manner of its administration, to the supervision and control usually prevailing in relationships between the Government and its employees.”

9. Other than providing definitions as to what constitutes personal and nonpersonal services, however, the OMB Circular, RSH, AR and DA Pam provide no additional guidance to assist the DOC in determining if an A-76 study could result in a prohibited personal services contract.

10. FAR 37.103 – “Contracting officer responsibility”, states that it is the contracting officer’s responsibility to determine if the proposed services are for a personal or nonpersonal services contract using the definitions in FAR 37.101 and the guidelines in FAR 37.104. However, as previously discussed, in an A-76 study, DA Pam 5-20 states that it is the DOC’s responsibility to determine if personal services are included in the PWS for the A-76 study.

11. The only guidelines available to the DOC are set forth in Part 37 of the FAR. FAR 37.104 - Personal services contracts, provides that an employer-employee relationship under a service contract occurs when, as a result of (i) the contract’s terms or (ii) the manner of its administration during performance, contractor personnel are subject to the relatively continuous supervision and control of a Government officer or employee. The example given at FAR 37.104 is that giving an order for a specific article or service, with the right to reject the finished product or result, is not the type of supervision or control that converts an individual who is an independent contractor into a Government employee.

12. According to FAR 37.104 (c) (2), the determination as to whether a service being provided by a contractor is personal or nonpersonal is based on the facts and circumstances of each situation. The key question is “will the Government exercise relatively continuous supervision and control over the contractor personnel performing the contract?”

13. FAR 37.104 (d) sets forth the following “descriptive elements” that should be used as a guide in assessing whether or not a proposed contract is personal in nature:

1. Performance on site.
1. Principal tools and equipment furnished by the Government.
1. Services are applied directly to the integral effort of agencies or an organizational subpart in furtherance of assigned function or mission.
1. Comparable services, meeting comparable needs, are performed in the same or similar agencies using civil service personnel.
1. The need for the type of service provided can reasonably be expected to last beyond 1 year. The inherent nature of the service, or the manner in which it is provided, reasonably requires directly or indirectly, Government direction or supervision of contractor employees in order to –
 - (i) Adequately protect the Government’s interest;
 - (ii) Retain control of the function involved;or
 - (i) Retain full personal responsibility for the functions supported in a duly authorized Federal officer or employee.

14. Further guidance can be found in General Accounting Office (GAO) decisions that address what constitutes personal services contracts.

15. In Americorp, B-231644, Oct. 6, 1988 88-2 CPD 331, the GAO denied a protest in which the protestor alleged that the Department of the Navy was attempting to convert a nonpersonal services contract into a personal services contract in violation of FAR 37.104(b). In denying the protest the GAO held that:

We have carefully examined the protestor’s allegations in regard to the specific provisions of the RFP and we find no basis to conclude that the Navy is attempting to procure an unauthorized personal service contract. In order for such a situation to occur, the contract must provide for detailed government direction or

supervision of the contractor's employees. See *McGregor FSC, Inc.*, B-224634, Nov. 7, 1986, 86-2 CPD 537.

FAR 37.104 (c) (2) states that the key question is always whether the government will exercise continuous supervision and control over the contractor personnel performing the contract. Here, the RFP provides that the contractor shall monitor employees and ensure that employees meet the requirements of the RFP and that the Family Advocacy Counselor/Program Coordinator, not the government, has the duty and responsibility of overseeing employees and coordinating and carrying out the agency's programs or services under the RFP. Therefore, we find no basis to conclude that the Navy is attempting to award an unauthorized personal services contract.

16. In *W. B. Jolley*, B-234146, March 31, 1989, 89-1 CPD 339, the GAO held that an agency contract for aircraft maintenance services did not create an illegal employer-employee relationship where the services to be provided were not subject to relatively continuous Government supervision and control and adequate direction was provided to the contractor through detailed written specifications contained in the solicitation. In this case the solicitation specifically stated that the services to be provided were nonpersonal services and that no employer-employee relationship existed. The solicitation also provided that the contractor was to provide management and supervisory functions.

The GAO held that:

Each contract arrangement is judged in light of its particular circumstances. *Monarch Enterprises, Inc.*, B-233303 et al., Mar. 2, 1989, 89-1 CPD. While the FAR enumerates various factors to be considered in making this judgment, including whether performance is on site and whether principal tools are furnished by the government, it provides that the "key question" in determining whether a contract is for personal services is "Will the government exercise relatively continuous supervision and control over the contractor personal performing the contract." FAR 37.104 (c) (2) (FAC 84-40).

In denying the protest the GAO also determined that:

First, many essential characteristics of the employer-employee relationship are not present here in the relationship between the government and contractor employees. Factors such as the contractor's right to hire and fire employees, to grant or deny individual leave requests, and to reassign employees negate the existence of a personal services contract as defined in the FAR. Second, and most importantly, our review of the language contained in the IFB indicates that the contractor is solely responsible for the supervision, management, and inspections of its employees' work under the contract. Specifically, the terms of the IFB provide that contractor employees, not the government, have the duty of

overseeing employees and coordinating performance with the contracting officer's representative. See Americorp, B-231644, Oct. 6, 1988, 88-2 CPD 331. Also, our review indicates that adequate direction is provided to the contractor through detailed written specifications contained in the solicitation. We therefore do not find that the government will exercise relatively continuous supervision and control over the contractor personnel performing the contract.

17. The A-76 process does not permit the awarding of personal services contracts. If an A-76 study is to be conducted, the DOC must review the PWS to be issued to determine if it contains any personal services requirements. If the PWS does contain personal services requirements, they must be deleted from the PWS. In determining if a PWS to be used in an A-76 study contains personal services, the DOC should follow the guidance set forth in Part 37 of the FAR and the criteria applied by the GAO in determining if a solicitation is for personal or nonpersonal services. Therefore, it appears that contracting for administrative or secretarial services traditionally provided by the Legal Office support staff would be difficult since obtaining those services from contractor personnel without relatively continuous supervision does not appear feasible.

18. The Point of Contact for this subject in the CECOM Legal Office is Mr. James Scuro (732) 532-9801, DSN 992-9801.

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